IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-748

C.D. (Denny) ABBOTT,

Petitioner,

vs.

WILLIAM F. THETFORD, Individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama (JOHN W. DAVIS, III, substituted for William F. Thetford in his official capacity as Judge of the Family Court of Montgomery County, Alabama),

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Howard A. Mandell
P.O. Box 1904
Montgomery, AL 36103

Melvin L. Wulf
22 East 40th St.
New York, NY 10016

Neil Bradley
Laughlin McDonald
Christopher Coates
52 Fairlie St., NW
Atlanta, GA 30303

Counsel for Petitioner

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TO THE UNITED STATES COURT OF APPEALS
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 6, 1976.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit adopting the dissent from the panel decision

is reported at 534 F.2d 1101 and is appended hereto at 1a. The panel opinion and dissent of that court is reported at 529 F.2d 695 and is appended hereto at 3a. The opinion of the United States District Court for the Middle District of Alabama is reported at 354 F.Supp. 1280 and is appended hereto at 18a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 6, 1976. A timely petition for rehearing was filed and denied on August 12, 1976. 47a. By order of November 1, 1976, the time for filing a petition for writ of certiorari was extended by Mr. Justice Powell to and including November 30, 1976. This Court has jurisdiction to review the judgment below under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether an order to a chief probation officer, a merit service employee, not to file lawsuits is void on its face?

II. Whether a chief probation officer, a merit service employee, may be discharged for filing a lawsuit on behalf of minor Negro children seeking integrated and adequate facilities for their care?

III. Whether the purpose of an order, alleged to be racial in motivation, is relevant in a proceeding challenging petitioner's discharge for violation of the order?

IV. Whether a state judicial officer is entitled to any nature of immunity when he is sued for his actions as an employer by a merit service employee for discharge from employment, such action alleged to be in violation of first and fourteenth amendment rights?

V. Whether the district judge applied erroneous standards in denying petitioner's motion to recuse, said motion being suggested by the judge?

STATUTORY PROVISIONS RELIED UPON

The statutory provision relied upon, Pub.L. 93-512, 88 Stat. 1609, 28 U.S.C. §455, is set forth in full in the appendix at 56a.

STATEMENT OF THE CASE

This was an action brought by the petitioner, C.D. (Denny) Abbott, seeking reinstatement and back pay when he was discharged from his position as Chief Probation Officer of the Circuit Court of Montgomery County, Alabama. He alleged that he was discharged because he had filed a lawsuit as guardian and next friend to three dependent Negro minors.[1]

Until his discharge on November 22, 1972, Abbott had been Chief Probation Officer of the Circuit Court of Montgomery County, Alabama, a merit service position which he had held for nine years. William F. Thetford was the judge of the Domestic Relations Division of that court, and as such, served in the capacity of the county's juvenile judge. During the appeal of this case he was succeeded in office by John W. Davis, III.

The 1969 lawsuit

In 1969 Abbott filed a suit on behalf of minor children to alleviate conditions at the Montgomery County Detention facility and the then segregated Mt. Meigs Industrial School for Delinquent Negro Boys. The United States Department of Justice subsequently intervened and a consent decree entered promising reform. 4a. After the filing of the 1969 suit, Thetford issued an order that Abbott should cease and desist from issuing press releases about the litigation. A505.[1] A check of records by Thetford's staff, however, revealed no press releases by Abbott about the lawsuit. A504-05.

In addition to issuing the order, Thetford also sought legislation altering Aboott's merit system status and

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1. That lawsuit is Emmett Player, et al. v. State of Alabama Department of Pensions and Security, et al., Civil Action No. 3835-N, (M.D. Ala. 1972). The district court opinion is reported at 400 F.Supp. 249 (M.D. Ala. 1975), and is currently on appeal in the court of appeals. The instant action arose as a motion for supplemental relief in that case. The district court per Judge Frank M. Johnson, Jr., denied the relief sought in the motion but directed that the motion "be filed by the Clerk of this Court as a separate civil action upon the payment of the required filing fee." 51 a. It proceeded therefrom as a separate civil action. Jurisdiction was based, inter alia, on 28 U.S.C. §1331, 1343 and 42 U.S.C. §1983.

1. The symbols A and EA refer to the appendix and the exhibits appendix filed in the court of appeals.

making the chief probation officer responsible solely to him. A508-09. Abbott made a statement to the press that he would comment about the proposed legislation (not the litigation), whereupon he was suspended by Thetford for fifteen days for deliberate and willful disobedience of the order. 4a, EA 190, A506.[1]

The 1972 order

On September 29, 1972, Thetford called a meeting for three supervisory personnel, including Abbott, at which time he issued an oral directive banning the filing of lawsuits by staff. Thetford testified that he issued the order "since his suspicions of possible litigation were aroused when he was informed that Abbott had been seen frequently visiting the office of a well-known civil rights lawyer in Montgomery." 5a.

Various versions of the order were testified to, 5a. The district court found that everyone understood that the order prohibited only those suits which Thetford felt would affect the operation of his court and its purpose was to provide him the opportunity to decide the propriety of the suit.[2]

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1. The legislation was not passed. A509.

2. This finding was apparently adopted by the court of appeals. 12a.

On November 17, 1972, Abbott filed a lawsuit as guardian and next friend of three black minors seeking to prevent the State Department of Pensions and Security from utilizing private institutions which were segregated on the basis of race and to cease its refusal to refer black neglected and dependant children to such institutions. Thetford thereupon discharged Abbott for disobeying his prior order. 6a, 13a.

The Motivation of The Order and Discharge

Throughout the proceedings Abbott sought to show that the order of Thetford and the discharge were improperly motivated. Thetford took the position that the discharge was for disobedience of an order and that the motivation behind the order was not relevant. The district court found that the order was not issued until Thetford became aware that Abbott was spending time "in the office of a lawyer known to be interested in civil rights matters." 22a.

When Abbott sought to question Thetford in this case as to whether he agreed or disagreed with the 1972 lawsuit, objection as to the materiality of the questions was sustained, A545, and the opportunity to make an offer of proof was denied. A546. Thetford did testify that he did not believe the children's homes should be compelled to integrate, EA86, that he would not have issued the order if Abbott had gone to just any attorney, A523, and that he would not have approved the lawsuit if asked. A500. There was evidence that political factors were deemed important by the defense in asserting that a judge needed control over his staff. EA81, A447, A551. At the conclusion of the trial the district judge invited counsel into his chambers and stated that while he did not intend to

reason Thetford took the steps he did was because Abbottt's lawsuit was unpopular and Thetford had to run for re-election. A228.[1] This matter was set forth in plaintiff's motion to complete or supplement the record. Plaintiff also filed a post-trial memorandum which attached a newspaper article which quoted Thetford as stating that he would not send boys to state facilities which interfered with the segregation of those institutions since "I have to stand for re-election every six years, and integration is not popular." The district court denied the motion to correct or supplement the record, ruling inter alia, that the issue was one that was not raised during trial. 53a, 54a. It was indeed raised, but the district court refused to permit questioning in this area. A543-46. There is little doubt that the order applied was motivated by impermissible considerations. In fact, one of the defenses was that Abbott's action interfered with Thetford's efforts to get funding for a racially segregated home for black children. 13a, n.7, A55.

Abbott also sought to challenge the order on grounds of overbreadth, but the district court ruled that he could not do so unless the overbreadth applied to him. A379-81.

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1. The court did not dispute that it made such statement. A645-46.

The Interests Protected

Abbott alleged that in his capacity as Chief Probation Officer he had worked to protect the rights of all dependant, neglected and delinquent children brought to the Youth Aid Facility of Montgomery, Alabama, and that his knowledge of the acute need of more facilities for neglected children, especially black children, was based primarily on his experiences in his work. He alleged that the dismissal infringed his right, and those of the children he sought to protect, of access to the court. A2-3.

The court below determined the issue to be not whether Abbott or the minors had a right to file suit, but whether it was necessary for Abbott to file the 1972 suit on behalf of the minors. This determination, made in the opinion but not litigated as an issue joined, placed the burden upon Abbott to prove that the suit could not have been filed by someone else.

The district court found that the suit was financed by the ACLU whose members were available for nominal as well as financial support, meaning such persons could have allowed their names to be used in the litigation rather than Abbott's. 33a. It also found that one minor plaintiff had a living grandmother and another had a living father. 34a. These findings were cited on appeal. 14a.

The finding that the ACLU financed the litigation was not in fact correct.

Brief of Appellant, Ex. 2. It also ignores the difference between a citizen's providing financial support and entering litigation.[1] The finding that the minors had living relatives does not reveal that the living father was confined at Atmore State Prison, EA172, and the grandmother referred to is apparently the grandparents with whom the minor Price was placed after his great-grandmother was unable to care for him, said grandparents being seventy years old and sharing a small apartment with two other relatives. Ibid.

The Relationship Between Judge and Chief Probation Officer

The court of appeals found there was a "fundamental requirement of cooperation and confidence between a judge and his chief probation officer," 17a, and indeed concluded that Abbott's "primary duty is to cooperate with the judge, preserve the confidential and harmonious relationship between the judge and other staff members, and use his energy and talents in the discharge of the serious duties imposed

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1. A judicial presumption that there are persons available in Montgomery, Alabama, willing to sue a state agency, Baptist, Methodist, and Presbyterian Children's Homes, and a home established by the sheriffs of the State of Alabama, is simply unwarranted.

by law upon the court." Ibid. Abbott did not, however, have a position of confidentiality akin to a law clerk or secretary.

Abbott saw the judge but once a week, A66, the Youth Aid Facility where he worked being miles away from the court. If the trust of the judge was a primary aspect of his job, the legislature of Alabama would not have made his position a merit service protected position.

The Lawsuit Did Not Materially and Substantially Interfere With the Operation of the Court

Thetford testified that he lost confidence in Abbott because of the 1969 lawsuit, A550-51. Yet he kept Abbott on for three more years until the filing of the 1972 lawsuit. By Thetford's own testimony he had one of the best youth aid staffs in the state, A552, and there is no dispute, though the district court ruled it not material, that Abbott's record was one of excellence. EA4, EA182-85.

The lawsuit had little or not effect on the court's resources. The suit was against the state department which has to work with the juvenile courts under law. If that department's employees were displeased with the lawsuit, it did not relieve them of their obligation to perform their duties. As for the private homes, only nine children were placed with them during 1972 of the

hundreds before the court. A535. Seven of the nine went to a home established specifically to serve as a resource for the court and got most of its referrals from the court. A539. No representatives of the homes told Thetford they would cease doing business with the court. A57-58.

Further, the superintendent of Mt. Meigs said that the 1972 suit would not interfere with his ability to work with Abbott, EA41, and current and former employees under Thetford testified that the Youth Aid Facility had good working relationships with other agencies and homes, with Abbott, and could work with him in the future. A246-66, A274-75.

The Motions for Recusal

At an in-chambers conference, the district judge told plaintiff's counsel that he was a close friend of the defendant and that a motion to recuse would be well received. After consulting with Abbott, such a motion was filed and amended. A17-20. It was denied, A22; the rationale was that of the judge's "duty to sit," and the judge concluding "I think I can be fair." A100-01. Abbott filed a second motion to recuse, renewing the first ground and adding that during another in-chambers conference, the district judge had accused the plaintiff's attorney of soliciting the 1972 lawsuit and of unethical conduct. A100-110. A hearing was held and the judge did not recuse himself. The failure to recuse was presented on appeal but the court of appeals did not discuss the issue.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the court of appeals decided important federal questions in conflict with applicable decisions of this Court and because Abbott's motion to recuse was not considered under the proper statutory standards.

I.

A. Infringement of First Amendment Rights of Public Employees May Not Be Justified By Impermissible Reasons.

The court of appeals, though acknowledging the reason behind the issuance of the order, looked only for evidence that Abbott's action would be disruptive to the court. It does not mention at all that Thetford did not favor the efforts to end segregation, although the court recognized that Thetford argued that the lawsuit interfered with his effort to expand segregation by seeking funding for a black home. 13a, n. 7.

This Court has repeatedly stated, most recently in Elrod v. Burns, ___U.S.___, 96 S.Ct. 2673, 2683 (1976), quoting from Perry v. Sindermann, 408 U.S. 593, 597 (1972), that:

> [f]or at least a quarter-century, this Court has made clear that even though a person has no

> "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Thetford is not allowed to "produce a result which the State could not command directly." Speiser v. Randall, 357 U.S. 513, 526 (1958).

One thing which a state cannot command directly is that segregation in the placements by a juvenile court and the state department of pensions and security shall not be interfered with nor be subject to federal judicial redress. Nor can a rule which seeks to continue that segregation (by forbidding public employees from seeking to correct it) be used to bootstrap the public employer into a position of being able to discharge the employee. Nor can the claim that the effort by the employee to end segregation interfered with Thetford's efforts to expand segregation by seeking financing for a black home be a constitutional justification for termination.

If Thetford intended to interfere with the exercise of rights by interfering with the seeking of redress in federal court, then disobedience of his order is not justification for termination.

Elrod v. Burns, supra, made clear that any limitation on the exercise of a first amendment right by a public employee must

be justified by the state. Here the justification by presumption that other persons could have sued for the minors--an action also encompassed by the order banning assisting litigation (and in a suit in which the court accused plaintiff's attorney of unethical solicitation)--could not be sufficient. Johnson v. Avery, 393 U.S. 483 (1969).

B. Motivation of the Order is Relevant.

In upholding the discharge for disobedience, the courts below agreed with Thetford that no matter the purpose of the order, its violation was punishable. Abbott established that the order was aimed at stopping lawsuits that Thetford did not like, and that those lawsuits concerned racial discrimination. "An official action. . .taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution. . ." City of Richmond, Virginia v. United States, 422 U.S. 358, 95 S.Ct. 2296, 2307 (1975). At the very least the motivation of the order was material to Abbott's case, Washington v. Davis, ___U.S.___, 96 S.Ct. 2040 (1976), Lemon v. Kurtzman, 403 U.S. 602 (1971). The courts below erred in failing to consider the evidence of impermissible motivation for the order.

II.

This Court Should Give Plenary Review to a Decision Which Concludes that Federal Courts Should Avoid on Grounds of Comity and Federalism the Chambers of a State Court Judge Even When the Judicial Officer is Sued in His Role as an Employer.

The opinion of the court of appeals, written originally as a dissent, stated that the original majority opinion was "in total disregard for the principles of comity and federalism," and "entered boldly into the chambers of the judge of a state court of record." 9a. It concluded,

> Finally, if this court is to extend the reach of federal power as evidenced by the majority opinion, it would be well advised to avoid decisions that invade the chambers of a state court judge, strike down his administrative rulings and require the court over which he presides to continue the employment of a willfully disobedient employee. 17a.

Since this opinion was originally issued as a dissent, its conclusions are not as precise as is usual in majority opinions. Consequently it cannot be said unequivocally that the decision rests on comity or federalism, or a finding of judicial immunity. But it is clear that such

doctrines were considered relevant in the decision, and may have been controlling.

While state judicial officers may be immune from suits under 42 U.S.C. §1983 for their judicial actions, the extension of that doctrine to their functions as employers merits review by this Court.

This case does not present a question of judicial immunity insofar as employment actions vis-a-vis law clerks, secretaries, or even persons working in a clerk's office. Now does it involve a question of whether a judicial officer should have the authority to dismiss an employee who sues him or criticizes the judge's functions. Compare, Pickering v. Board of Education, 391 U.S. 563 (1968). It does concern a public servant sworn to uphold the constitution no less than Thetford. 4 U.S.C. §101. Abbott had responsibilities to those children commanded to his supervision. He, perhaps more than Thetford, was responsible for and answerable to claims by such children that their rights were being infringed for he had a direct hand in implementing those rights which were being denied. Wood v. Strickland, 420 U.S. 308 (1975). By his position he had access to knowledge which he was not free to ignore. It is one thing to have an opinion and to keep silent. But when a public official has the duty, responsibility and authority to provide care for minor children, his silence or inaction in the face of constitutional violations becomes a part of the violations.

The court of appeals opinion vaults trust, confidence and harmony over the duty of a merit service employee's refusal to participate in constitutional violations. Abbott could not use the order as a defense to any action against him, nor should he be required to forfeit his employment because of such an order.

III.

This Court Should Consider the Standards For Recusal Under 28 U.S.C. §455

Section 455 of Title 28, United States Code, was amended while this case was on appeal, and the fifth circuit has held that the amended statute is applicable to cases not fully submitted on appeal, such as this one, as of the date of the amendment. Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 102 (5th Cir. 1975)(en banc); Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975); cert. den., ___U.S.___, 96 S.Ct. 1685 (1976).

The amended recusal statute laid to rest the "duty to sit" doctrine, and under the holding of Parrish implemented an objective "reasonable factual basis--reasonable man test" for determining whether a judge should recuse himself. This Court should consider whether the statutory language that the judge's "impartiality might reasonably be

questioned," 28 U.S.C. §455(a) refers to a reasonable man's belief of bias or whether

> the standard is one that merely requires that the facts be such, their truth being assumed, as would convince a reasonable man that the affiant reasonably believed that bias exists. (Emphasis original.) Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d at 108 (Tuttle, J. dissenting).

Abbott certainly had a reasonable belief that the judge could not fairly hear the case since the judge stated so, and was later only able to conclude that he thought he could be fair. And since the district judge applied the "duty to sit" doctrine, Abbott is entitled to have his case determined under applicable law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

Howard A. Mandell

Neil Bradley
Laughlin McDonald
Christopher Coates

Melvin L. Wulf

ATTORNEYS FOR PETITIONER

C. D. (Denny) ABBOTT, Plaintiff-Appellant,

v.

William F. THETFORD, Individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama (John W. Davis, III, substituted for William F. Thetford in his official capacity as Judge of the Family Court of Montgomery County, Alabama), Defendants-Appellees.

No. 73-1894.

United States Court of Appeals, Fifth Circuit.

July 6, 1976.

After he was discharged from his position as the chief probation officer of a state juvenile court because of his action in filing, contrary to orders of the juvenile court judge, a civil action on behalf of three minor black children charging that racially discriminatory admission policies were maintained by the State Department of Pensions and Securities and homes for dependent and neglected children, plaintiff brought federal civil rights action challenging such discharge on First Amendment grounds. The United States District Court for the Middle District of Alabama at Montgomery, Robert E. Varner, J., 354 F.Supp. 1280, dismissed the complaint and plaintiff appealed. The Court of Appeals, 529 F.2d 695, reversed and remanded. On rehearing en banc, the Court of Appeals held that in view of the importance of a cooperative and a confidential relationship between juvenile court judge and chief probation officer to the operation of the court, juvenile court judge had authority, under the circumstances, to discharge chief probation officer who willfully violated judge's order concerning the filing of lawsuits.

Judgment of the District Court affirmed.

Clark, Circuit Judge, filed a specially concurring opinion.

Brown, Chief Judge, with whom Goldberg, Circuit Judge, joined, dissented from the en banc opinion.

1. Courts ⇐55

In view of the importance of a cooperative and a confidential relationship between juvenile court judge and chief probation officer to the operation of the court, juvenile court judge had authority, under the circumstances, to discharge chief probation officer who willfully violated judge's order concerning the filing of lawsuits. U.S.C.A.Const. Amends. 1, 14.

2. Constitutional Law ⇐82

In considering First Amendment rights the court is always required to look at the place, time, and circumstances involved in striking the necessary delicate balance between the interests of the government and the constitutional rights of the individual. U.S.C.A.Const. Amend. 1.

3. Courts ⇐55

In determining whether juvenile court judge properly discharged chief probation officer who violated order concerning the filing of lawsuits, district court properly applied the balance of interests test. U.S.C.A.Const. Amend. 1.

4. Courts ⇐55

Fact that lawsuit filed by chief probation officer in violation of juvenile court judge's directive concerning filing of lawsuits was filed against the chief

resources of the juvenile court provided an adequate objective foundation for juvenile court judge's conclusion, as reason for discharging the officer, that disruption to the juvenile court's operations was likely. U.S.C.A.Const. Amend. 1.

Appeal from the United States District Court for the Middle District of Alabama.

Before BROWN, Chief Judge, GEWIN, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

The majority panel opinion in this cause, 529 F.2d 695–702 is reversed, vacated and set aside. The Court en banc adopts as its opinion the dissenting opinion of Judge Gewin, 529 F.2d 702–709 [from which the syllabus paragraphs are drawn]. Accordingly the judgment of the district court, 354 F.Supp. 1280 (M.D. Ala.1973) is AFFIRMED.

CLARK, Circuit Judge, specially concurring:

My concurrence rests on several factors not mentioned in the panel dissent which the en banc court today adopts. At oral argument, it became clear that, despite the literal language of his letter "discharging" Abbott, Judge Thetford's action only constituted a recommendation to the county commission, which actually discharged Abbott and which alone had the authority to order his reinstatement and the consequent removal of the person who had since replaced him. This, coupled with Abbott's failure to join the commission or its members as parties and the succession of Judge John W. Davis III to the office formerly held by Judge Thetford, means that, at most, the court below could only order the successor defendant, Judge Davis, to recommend to the county commission that it reconsider Abbott's discharge and disregard his predecessor's recommendation that he be replaced. Even such a questionable exercise of the "strong arm" of equity would grant a form of relief that Abbott's complaint never requested.

The panel majority, which the court en banc reverses, ordered the defendant Thetford to take actions which neither he nor his successor had any official capacity to effectuate. On the other hand, I see no need for the en banc court to reach the broader issues which the adoption of the panel dissent covers. Since Abbott's complaint sought relief from a former judicial officer who was entitled to an immunity from personal liability and whose successor could not control the relief sought, I am persuaded that the trial court properly dismissed the action and I concur in the result.

JOHN R. BROWN, Chief Judge, and GOLDBERG, Circuit Judge, dissenting:

We dissent from the en banc opinion for the reasons set forth in the majority panel opinion, 529 F.2d 695–702.

* Judges Wisdom and Godbold did not participate in this decision.

C. D. (Denny) ABBOTT,
Plaintiff-Appellant,

v.

William F. THETFORD, Individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama, Defendant-Appellee.

No. 73-1894.

United States Court of Appeals,
Fifth Circuit.

April 2, 1976.

Rehearing En Banc Granted
April 21, 1976.

Appeal from the United States District Court for the Middle District of Alabama.

Before BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.*

JOHN R. BROWN, Chief Judge:

On November 17, 1972, C. D. (Denny) Abbott, then Chief Probation Officer of the Circuit Court of Montgomery County, Alabama, Domestic Relations Division, filed a civil action in Federal District Court on behalf of three minor black children charging that racially discriminatory admission policies were maintained by the Alabama Department of Pensions and Security and six homes for dependent and neglected children. In response to this suit, William F. Thetford, Judge of the Juvenile Court for which Abbott was Chief Probation Officer, discharged Abbott on grounds that his action in filing the suit violated an express order of the Judge prohibiting

Domestic Relations Court. In view of the fact that Abbott has made clear in his affidavit that he wants his job back, the issue is live as to him.

Several of the legal principles, such as reinstatement, pertain to the office of Judge of the Domestic Relations Division rather than to the individual holding that office. We decline, therefore, at this time to dismiss the case as moot.

But on remand, the District Court should explore the facts and issues carefully and make any necessary decisions as to partial or total mootness, considering particularly those claims against Thetford as Domestic Relations Judge and those against him in his individual capacity. As factual exploration is necessary, we intimate no views on mootness.

the filing of lawsuits by staff employees. Furthermore, the Judge felt that Abbott's continued employment as Chief Probation Officer would disrupt the efficient operations of his Court. Abbott challenged his discharge in Federal Court bringing a complaint pursuant to 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343(3). The District Court held a lengthy hearing, and on February 20, 1973, rendered an opinion dismissing Abbott's complaint. We conclude that the District Court improperly dismissed Abbott's complaint and reverse and remand.

Montgomery County's Juvenile Court is incorporated within the Domestic Relations Division of the Montgomery Circuit Court. Judge Thetford presided over the Juvenile Court and for nine years prior to his discharge, Denny Abbott had served as Chief Probation Officer. Most of the Juvenile Court's caseload is received from the Youth Aid Division of the Police Department. The Juvenile Court attempts to place dependent and neglected children in children's homes throughout the state, but the Court must depend heavily on the Alabama Department of Pensions and Security, or Welfare Office, which has primary responsibility for such placement. Private homes, mostly church operated and dependent on voluntary contributions for financial support, are the major resource for the placement of the children.

In 1972 most of these children's homes throughout Alabama remained segregated by race. There were two children's homes in Montgomery County, Brantwood, an all-white institution, and Our Lady of Fatima, an all-black home operated by a Catholic priest.[1]

As Chief Probation Officer, Abbott worked closely with the other members of the probation staff.[2] Abbott also served as the link between Judge Thetford and the probation staff, thereby necessitating a direct working relationship with Judge Thetford. While Abbott was employed on the merit system, and not at the discretion of Judge Thetford, he worked for the Judge and a degree of cooperation was necessary for efficient court operation.

The 1969 Lawsuit

The first serious trouble between Judge Thetford and Abbott occurred in 1969. In January of that year, Abbott as next friend filed a class action suit[3] in Federal Court on behalf of five black children then being held in the detention facilities of Montgomery County. The suit sought to improve conditions at the detention facility and correct the mistreatment of black children at the Mt. Meigs Industrial School for Delinquent Negro Boys.[4]

Judge Thetford responded unfavorably to the lawsuit and suspended Abbott for 15 days for his "deliberate and willful disobedience of instructions." Abbott explained his actions in a letter to Judge Thetford prior to his suspension:

> "I would like to assure you that my action in Federal Court was, in no way, intended to reflect upon you or the court. I am, indeed, sorry if you feel that such action was a betrayal of your trust in me. I feel that I have not betrayed my conscience or the young people of Montgomery County."

Abbott returned to his position as Chief Probation Officer at the termination of his suspension and no further conflicts occurred over the 1969 lawsuit.

Judge Thetford's 1972 Order

On September 29, 1972, Judge Thetford called a meeting in his office with the supervisory probation personnel including Abbott, Mr. Franklin and Ms. Goodwyn. Judge Thetford testified at the District Court hearing that he called the staff meeting since his suspicions of possible litigation were aroused when he was informed that Abbott had been seen frequently visiting the office of a well-known civil rights lawyer in Montgomery. An oral directive was given by the Judge concerning the filing of lawsuits by the supervisory personnel or other staff members. Abbott relayed this directive on to the other staff members. Since there was no written directive issued, varying versions of the Judge's instructions were recalled at the District Court hearing.[5]

Abbott testified that to the best of his recollection Judge Thetford had instructed the three staff members that "no personnel at the Montgomery County Youth Facility would aid, assist in the filing, or file any lawsuit in any court regarding any matter." In his complaint, however, Abbott recounted that Judge Thetford's oral directive only admonished that "no suits [are to be] filed by any personnel of the Montgomery County Youth Facilities without my prior knowledge and approval."

1972 Lawsuit

On November 17, 1972, Abbott filed a class action,[6] in Federal District Court, on behalf of three dependent and neglected black children seeking to integrate six all-white child-care institutions and seeking to require the Alabama Department of Pensions and Security to create more resources for black children. In no way did the suit challenge Judge Thetford's policies or official actions as judge of the Juvenile Court. Prior to filing the suit, however, Abbott did not consult Judge Thetford concerning the substance of the suit. On November 22, 1972, Judge Thetford notified Abbott by letter that he was discharged, effective immediately, for his action in filing the

1. In 1972 Our Lady of Fatima home closed and an effort was begun by Judge Thetford to establish a new home for black children.

2. The staff included Ms. Goodwyn, the Intake Officer, Mr. Franklin, the Detention Director, and four probation officers.

3. *Stockton v. Alabama Industrial School for Negro Children*, Civil No. 2834-N (M.D.Ala., filed January 23, 1969).

4. The United States Justice Department subsequently intervened in Abbott's behalf and a consent decree was signed promising reform of the conditions at Mt. Meigs.

5. At the District Court hearing Mr. Franklin testified that:

> "To the best of my recollection the judge said he didn't want us or any employee of the youth facility to file any suit or assist in the filing of any suit that would affect the operation of the Court."

Ms. Goodwyn also gave her recollection of the instructions which she passed on to her staff concerning Judge Thetford's order:

> "I explained to each one of the intake officers individually that Judge Thetford had stated to the supervisors of the court that there would be no lawsuit filed by anyone connected with the court that would affect the operation of the court, nor were we to assist in the filing of any suit that would affect the operation of the court without his knowledge."

Yet Ms. Goodwyn's initial recollection when she was deposed was somewhat different:

> "He said that he did not want anybody connected with the family court or youth facilities to be a party to the filing of any sort of lawsuits or assist in the filing of any lawsuits in any way."

6. *Player v. State of Alabama Department of Pensions and Security*, Civil No. 3835-N (M.D. Ala., filed November 17, 1972).

lawsuit.[7] Abbott brought this present action as a "motion for supplemental relief" on the class action which he had filed on November 17, 1972. The District Court treated the motion as a new and separate claim.

Constitutionality Of The Judge's Order

[1] We must first determine whether Judge Thetford's oral directive could constitutionally prohibit the probation personnel from filing lawsuits. The right to file a law suit is a form of communication embraced by the First Amendment which "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *N.A.A.C.P. v. Button*, 1963, 371 U.S. 415, 429, 83 S.Ct. 328, 336, 9 L.Ed.2d 405, 416.

In *Button* the State of Virginia imposed criminal penalties for (1) advising persons of when their legal rights were infringed, (2) referring these persons to attorneys for legal assistance, and (3) the rendering of such legal assistance. The Supreme Court held that the State's interest in regulating barratry did not justify an unconstitutional intrusion on the NAACP's freedom of expression and association. Freedom of access to the Courts is necessary since "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." 371 U.S. at 430, 83 S.Ct. at 336, 9 L.Ed.2d at 416.

Clearly Abbott and all the other probation personnel possess the right of free access to the courts for purposes of prosecuting a lawsuit. But the exercise of this acknowledged right to litigate has its boundaries as does the exercise of other First Amendment freedoms by state employees. The state has a legitimate interest in promoting the efficient operation of government and "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 1968, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811, 817.

[2, 3] In regulation of First Amendment freedoms of state employees, a balance must be reached between the interest of the state and the interest of the employee as a person. *Pickering v. Board of Education, supra*, 391 U.S. at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817; *Battle v. Mulholland*, 5 Cir., 1971, 439 F.2d 321, 324. It is important to remember in striking this balance that the theory espousing the right of the state to impose any conditions, regardless of how unreasonable, on the freedoms of state employees has been rejected. *Keyishian v. Board of Regents*, 1967, 385 U.S. 589, 605–606, 87 S.Ct. 675, 684–685, 17 L.Ed.2d 629, 642. Furthermore, the Court has ensured the right of state employees to exercise their First Amendment rights in matters of public concern even though they may be directed at their supervisors who do not wish to contend with the employees' expressions of opinion. *Pickering v. Board of Education, supra*, 391 U.S. at 574, 88 S.Ct. at 1737, 20 L.Ed.2d at 820; *Tinker v. Des Moines Independent Community School District*, 1969, 393 U.S. 503, 511–513, 89 S.Ct. 733, 739–740, 21 L.Ed.2d 731, 740–741; *Burnside v. Byars*, 5 Cir., 1966, 363 F.2d 744, 749. See *United States Civil Service Commission v. National Association of Letter Carriers, AFL–CIO*, 1973, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, in which the Supreme Court struck the balance in favor of governmental restraints of employees' partisan political activities by upholding the constitutionality of the Hatch Act, 5 U.S.C.A. § 7324(a)(2).

In weighing the balance between Judge Thetford's oral directive and the restriction it placed on the Juvenile Court employees' right to litigate, we must consider the purpose to be achieved by the directive in balance with the degree of restriction placed on the Juvenile Court staff's exercise of their First Amendment freedoms. Judge Thetford testified that he issued the order to preserve the effective operation of the Juvenile Court. To the best of his recollection Judge Thetford testified that he told Abbott, Mr. Franklin and Ms. Goodwyn at the September meeting that he "wanted no suit filed by any member of our staff which would affect the work of the Court without my knowledge and approval." In his letter of November 22, 1972 (note 7, *supra*) discharging Abbott, Judge Thetford reasoned that Abbott's action in filing the lawsuit against the six children's homes and the Department of Pensions and Security was in "flagrant and willful disobedience of orders." In testimony Judge Thetford explained that failure to obtain his approval for filing the lawsuit was partially the reason for discharging Abbott, the other reason being that it "affected the operation of my Court."

We have already discussed the First Amendment freedom to litigate which state employees possess. Judge Thetford's order restricted the exercise of this right by the staff of the Juvenile Court. For purposes of resolving the constitutionality of the order, we accept Judge Thetford's own interpretation of his order. During oral argument before this Court there was a great deal of preoccupation with facial overbreadth of the order as opposed to unconstitutionality as applied. On this record we feel no need to enter into this find distinction. If the order left Judge Thetford with the subjective determination as to whether a lawsuit affected the operation of the Juvenile Court then the order would be facially overbroad. Whether a lawsuit interfered with the Court operations must be determined on objective standards. There must be sufficient precision in any rule restricting First Amendment freedoms. *Hobbs v. Thompson*, 5 Cir., 1971, 448 F.2d 456, 472.

[4] But for our purposes it is enough to hold that the order was unconstitutional as applied since the record is devoid of any evidence that the Juvenile Court was in any way interfered with by Abbott being a party to an anti-discrimination lawsuit. The record indicates that the overriding reason for the issuance of the order and subsequent discharge of Abbott was Judge Thetford's subjective dislike of the suit filed. This conclusion is reflected in the findings of fact contained in the District Judge's Memorandum Opinion. The District Judge in analyzing the different inter-

7. Judge Thetford explained his reasons for discharging Abbott in his letter of November 22, 1972.

> "In yesterday morning's paper I read that as Chief Probation Officer of the Montgomery County Family Court, you have filed suit against numerous persons, including, but not limited to, the Brantwood Children's Home, the Baptist Home at Troy, the Methodist Children's Home at Selma, and the State Department of Pensions and Security. This, of course as you realize, was without prior consultation with me, and this suit was filed without either my knowledge or approval.
>
> In view of your flagrant and wilful disobedience of orders, you are hereby discharged as Chief Probation Officer, Montgomery County Family Court. This discharge is effective immediately."

pretations of Judge Thetford's order found that "all concerned understood that the type of suit intended to be prohibited was any suit that the Judge *felt* would affect the operation of the Court." (Emphasis added).

The proper test for determining the constitutionality of the order must be whether from an objective viewpoint the exercise of First Amendment rights disrupts and materially affects the whole operative procedures of the court. Again we stress that nothing in the record shows any disruption or interference occurred as a result of Abbott filing the 1972 lawsuit. It can be argued that Judge Thetford's discharge of Abbott only five days after the suit was filed preempted any disruption.

[5] But the record is also devoid of any evidence that disruption *would likely have* occurred as a result of the lawsuit. Following the 1969 lawsuit filed by Abbott, the court operations suffered no disruption. There was no reason reflected by this record to support the belief that any other effect would result from the 1972 lawsuit. The mere fear or apprehension of a disturbance is not enough to justify denial of the freedom of expression. *Tinker v. Des Moines Independent Community School District*, 1969, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731, 739; *Battle v. Mulholland*, 5 Cir., 1971, 439 F.2d 321, 324. While Judge Thetford would not be required to have delayed discharging Abbott until disruption to the Juvenile Court's operations actually occurred, he must have shown sufficient facts upon which he could have reasonably forecast disruption. *Shanley v. Northeast Independent School District, Bexar County, Texas*, 5 Cir., 1972, 462 F.2d 960, 970–71. Since the discharge of Abbott was based on nothing more than Judge Thetford's subjective apprehensions of disturbance to the Juvenile Court, we conclude that the discharge was unwarranted and in violation of Abbott's First Amendment freedoms.

Reinstatement

[6] While the equitable relief of reinstatement of state employees discharged in violation of their constitutional rights has been primarily used in teacher dismissals, the Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases, e. g., *Sterzing v. Ft. Bend Independent School District*, 5 Cir., 1974, 496 F.2d 92, 93; *Lee v. Macon County Board of Education*, 5 Cir., 1971, 453 F.2d 1104, 1114; *Ramsey v. Hopkins*, 5 Cir., 1971, 447 F.2d 128; *Rauls v. Baker County, Georgia Board of Education*, 5 Cir., 1971, 445 F.2d 825, 826; *Harkless v. Sweeny Independent School District*, 5 Cir., 1970, 427 F.2d 319, 324, cert. denied, 1971, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439. Judge Thetford opposed any order reinstating Abbott to his former position as Chief Probation Officer with the Juvenile Court. Judge Thetford argued that the Chief Probation Officer must be a person loyal to the Judge with whom the Judge could work in an amiable relationship. A person who would disobey direct orders of the Judge would, therefore, seriously handicap the operations of the Court.

But in assaying this we must bear in mind the nature of the order which the employee disobeyed. The law cannot tolerate the *result* of discharge on the ground of intrusion upon the close working relationship required when the cause is the disobedience of an order constitutionally impermissible facially, in part, and in application.

While we share the concern of Judge Thetford that reinstatement might revive old antagonisms, every case of reinstatement raises the possibility of ill feelings. "Relief is not restricted to that which will be pleasing and free of irritation." *Sterzing, supra* at 93.

[7] Admittedly, the 1972 lawsuit was filed against the chief resources of the Juvenile Court but Abbott never challenged any of Judge Thetford's policies or rulings, administrative or judicial, in the lawsuit. The suit sought to change the policies of the Alabama Department of Pensions and Security and private children's homes over which Judge Thetford had no control. These policies of other agencies were, it is true, of significant operational consequence as Judge Thetford performed his important duties. But to attack them—also on the ground of the Constitution—was not an attack on the Judge or his Court or both. Judge Thetford can require much in the loyalty of his Chief Probation Officer and other functionaries. But the price cannot be an outright prohibition of constitutionally based suits that do not put the employee—suitor in defiance or criticism of his superior's decisions on matters other than, of course, the ban on litigation. Since Abbott's actions did not do that and antagonisms to further association must be attributed to feelings generated by the purposeful refusal to obey an order which is constitutionally unsupportable, reinstatement is equitably required.

Since the questions of backpay and attorney's fees present problems of the Eleventh Amendment, we remand for consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 1975, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141; *Edelman v. Jordan*, 1974, 415 U.S. 651, 659, 94 S.Ct. 1347, 39 L.Ed.2d 662, 670; *Gates v. Collier*, 5 Cir., 1975, 522 F.2d 81; *Newman v. Alabama*, 5 Cir., 1975, 522 F.2d 71; as well as the liability for damages, backpay, etc. in light of *Muzquiz v. City of San Antonio*, 5 Cir., 1976, 528 F.2d 499 [1976] (en banc), *aff'g and rev'g in part*, 1975, 520 F.2d 993; *Warner v. Board of Trustees of Police Pension Fund*, 5 Cir., 1976, 528 F.2d 505 [1976] (en banc), *rev'g*, 1975, 522 F.2d 1384.

Reversed and remanded.

GEWIN, Circuit Judge (dissenting):

With respectful regard for the judgment of my brothers of the majority I am compelled to dissent. I am unable to agree with the rationale articulated or the result reached in the majority opinion (sometimes *the opinion*).

Without the least obeisance or hesitation, and in total disregard for the principles of comity and federalism, the court today has entered boldly into the chambers of the judge of a state court of record and concluded that the judge improperly discharged a member of his staff for exercising his First Amendment rights. Purporting to apply equitable principles, it has ordered the reinstatement of the discharged employee.

The majority recognizes the existence of an Eleventh Amendment problem, but never satisfactorily faces it. The court's finding of unlawful discharge necessarily engenders several thorny concomitant questions that are completely overlooked. Among these are such issues as whether Mr. Abbott is entitled to back pay; who is to make that determination; whether the Judge is individually liable if back pay is to be awarded; [1] and what, if any,

1. This suit is against Judge Thetford both in his official capacity as Judge and individually.

conditions of reinstatement are to be imposed. Similarly ignored are the practical administrative problems with respect to the operation of Judge Thetford's court that will result from today's decision.[2] These troublesome matters will not vanish and they should not be pretermitted.

The issues decided as well as those ignored impel me to disassociate myself from this exercise of raw power which strikes a crushing blow to a state judge with autocratic overtones which are not mandated by the United States Constitution. The majority has improperly extended federal power to invade Judge Thetford's office and control the relationship between the Judge and his chief probation officer.

The opinion merely concludes that Abbott's complaint was improperly dismissed. There is little discussion of the evidence or the facts found by the district court. There is no specific holding that the facts found are not supported by substantial evidence and are clearly erroneous. There is only the conclusion that the record "is devoid of any evidence that the Juvenile Court[3] was in any way interfered with by Abbott being a party to an anti-discrimination suit." It is further concluded that "The record is also devoid of any evidence that disruption *would likely have* occurred as a result of the lawsuit." (emphasis in the original). The opinion recognizes that "while Judge Thetford would not be required to have delayed discharging Abbott until disruption to the Juvenile Court's operation actually occurred, he must have shown sufficient facts upon which he could have reasonably forecast disruption", citing *Shanley v. Northeast Independent School District, Bexar County, Texas*, 5 Cir. 1972, 462 F.2d 960, 970–71.

The foregoing conclusions require an analysis of the evidence and the facts found by the district court. The case before this court does not involve the status or welfare of minor wards of the court, white or black. The adequacy of detention facilities of the court are not an issue to be decided in this case. The issue to be determined by us is whether Judge Thetford possessed the authority to discharge the appellant Abbott under the facts and in the circumstances disclosed by the record. There is no claim of a denial of due process in the discharge. Nor is it claimed by Mr. Abbott that there is a complete insulation from discipline by a superior in all circumstances of alleged exercise of First Amendment rights. It is only claimed that in "the very narrow fact pattern of this case" the discharge is invalid. The lengthy opinion of the district court is reported in 354 F.Supp. 1280 (M.D.Ala. 1973).[4]

2. My comments concerning Judge Thetford and the Domestic Relations Division of the Circuit Court over which he presided when this case was tried, apply to his successor in that position.

3. The court is correctly described as the Circuit Court of Montgomery County, Alabama, Domestic Relations Division. Judge Thetford is the presiding judge of that court and as such serves as Juvenile Judge of Montgomery County's Juvenile Court. Judge Thetford was Mr. Abbott's immediate supervisor.

4. The Federal Supplement dates the opinion as January 26, 1973. The opinion and order from which this appeal was taken is dated February 20, 1973 and appears in the appendix at vol. 2, pp. 650–71 (Rec. 663–84). The opinion shown by the appendix and the opinion in the Federal Supplement are identical. We are unable to explain the discrepancy in dates. The opinion which appears in Federal Supplement omits the "Order" contained in the original opinion, which is as follows:

This is the third lawsuit filed by Mr. Abbott, the Chief Probation Officer serving Judge Thetford's court. The first suit was brought by him in his capacity as Chief Probation Officer of the court. The second one was brought by him as next friend of certain minor plaintiffs, but in the body of the complaint he alleged that he was the Chief Probation Officer of the court. The issues involved in those two cases are not before this court. The third lawsuit, and the one involved here, is a suit by Mr. Abbott, the Chief Probation Officer, against the Judge both in his official capacity and as an individual as noted earlier. It is undisputed on the record that as Chief Probation Officer, Mr. Abbott was the intermediate link in the chain of command between Judge Thetford and the court's staff of probation officers.

Prior to filing the 1969 lawsuit Mr. Abbott made no mention of his plans to file the suit in his capacity as Chief Probation Officer, nor did he discuss with the Judge the conditions at the detention facilities of the court in Montgomery or the conditions at the Mt. Meigs detention center that he hoped to remedy by this suit. At that time a large detention center was being constructed by Montgomery County and that construction was completed before the suit was finally concluded. On January 23, 1969 Judge Thetford wrote Mr. Abbott the following letter:

Dear Mr. Abbott:

I have completed a study of the complaint which you filed in Federal Court in the above styled cause.

You are aware of the fact that I was not informed of the filing of this suit until after the same had been filed. You are also aware of the fact that I was informed of no incidence of child mistreatment at the State Training School at Mt. Meigs prior to the filing of this suit. As Chief Probation Officer of the Family Court of Montgomery County, you also are aware of your duty to inform me of incidences of child abuse. The Family Court of Montgomery County has full authority to correct and punish incidences of child abuse and is the proper forum for such action. In your complaint you allege that detention facilities existing in Montgomery County are inadequate; while this is true, you are also aware of the fact that Montgomery County has recognized this and is in the process of spending more than eight hundred thousand dollars to correct this situation and provide people of Montgomery County with a detention facility which will be excelled by none in the nation.

As you know, over the years since I have been judge of this court, I have depended upon your integrity, trust and ability to a great extent in the operation of this court. As an officer of this court you have been granted great discretion because of the trust I had in you. Your actions as chief probation officer in withholding facts and in filing a suit in Federal Court without my knowledge is a distinct betrayal of that trust and of the court for whom you work.

(Record 490–92)

In the months following receipt of the letter, Judge Thetford expressed apprehension about publicity concerning the suit and possible damage to the image of

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that this case be, and the same is hereby, dismissed, and costs taxed against the Plaintiff Abbott, for the collection of which let execution issue.
Dated this 20th day of February 1973.

his court. He directed Mr. Abbott to refrain from issuing press releases. Notwithstanding the Judge's directive another press release was issued and Mr. Abbott was suspended for 15 days. This suspension was later reduced to 10 days.

Informed by one of his staff members of the possibility that Mr. Abbott was planning to file another lawsuit, Judge Thetford called a conference in his office with his supervisory probation personnel in September 1972. The evidence clearly supports the finding that the staff members knew the meaning of the directive of Judge Thetford that litigation which would affect the operation of the court should not be instituted by staff members without his prior knowledge and approval. As the staff members left the conference with Judge Thetford, Mr. Abbott confirmed the Judge's suspicion by stating to another staff member that "somebody has been talking to the Judge." Slightly over 6 weeks after the conference Mr. Abbott filed the 1972 lawsuit. Immediately after the suit was filed, the following conversation transpired between Mr. Abbott and the recording clerk of the detention facility:

> "He said, 'Well, I have done it again.'
>
> I says, 'Done what?'
>
> He said, 'I have filed another suit.'
>
> I asked him, 'Have you lost your cottonpicking mind?'
>
> He said, 'No, I like to keep things stirred up.'"

With respect to the instructions given by the Judge to Mr. Abbott and other members of the staff, the district court made the following finding:

> This Court finds that all concerned understood that the type suit intended to be prohibited was any suit that the Judge felt would affect the operation of the Court. Obviously, all parties understood that the purpose thereof was to provide that the Judge have an opportunity to decide the propriety of his assigned personnel's filing suits which the Judge thought might affect the effectiveness of his Court.

354 F.Supp. at 1283.

Prior to filing the 1972 suit, Mr. Abbott never evidenced any lacked of understanding of the Judge's directive, he sought no clarification of it, and there is no evidence that he ever discussed the matter with the Judge. If he had discussed the subject with the Judge and had given valid reasons for desiring to file the suit, and if the Judge had arbitrarily and capriciously withheld consent, a different case would be presented. As to the knowledge and understanding of Mr. Abbott the district court made the following finding:

> Within approximately one month after said order, Mr. Abbott wilfully and knowingly violated the Judge's order by filing the 1972 suit against the Alabama Department of Pensions and Securities and six allegedly private children's homes in Alabama—all of which are facilities of the Thetford Court in the sense that that Court must coordinate regularly with the Department and the Court has an opportunity to place neglected children in its custody with such homes at the homes' discretion.

354 F.Supp. at 1283. Moreover, the district court stated in its opinion that Mr. Abbott admitted wilful violation of the order but contended that the order with respect to filing lawsuits infringed his First Amendment rights and "chilled" the rights of the minors for whom he brought the suit.

Concededly, administrative remedies are provided by the laws of Alabama for persons situated like Mr. Abbott. However, he elected not to pursue state administrative remedies and the district court concluded that exhaustion was not necessary. At the conference when Mr. Abbott was discharged, Judge Thetford dictated the letter of discharge quoted in the majority opinion. As the letter was dictated, he turned to Mr. Abbott at intervals to inquire whether the letter was factually correct. Mr. Abbott agreed that the factual statements in the letter were correct. He was discharged for "flagrant and wilful disobedience of orders."

All of the defendants in the 1972 suit were agencies or entities with which Judge Thetford had to deal constantly. Some were private homes, which although under no obligation to do so, had from time to time accepted dependent or neglected children at the behest of the court. The harmony and goodwill of the officials of all of the agencies involved were in the best interest of the court and the children. It is a matter of common knowledge that lawsuits tend to discourage harmony and goodwill amongst litigants. The district court so found. 354 F.Supp. at 1284.

Two experienced family court judges testified as to the relationship between the judge of a family court and his chief probation officer. One of these judges testified that the probation officer is "the right arm of the judge." The testimony of both judges strongly supports the conclusion that the relationship between the judge and his chief probation officer must be one of confidence and cooperation.[5] One of the judges who testified stated that a suit by a family court official against the child placement agencies with which the court must deal in placing neglected and dependent children is disruptive of the effectiveness of the court. He further testified that common sense and responsibility, independent of any rule or directive, should have prevented the initiation of a suit such as that filed by Mr. Abbott.[6] Judge Thetford testified that he attempted to obtain improvements in the agencies with which he dealt by private conferences with the officials of such agencies, and that he considered a lawsuit as the last resort.[7] On the other hand, Mr. Ab-

5. Indeed the laws of Alabama provide that the records of the court here involved are to be kept confidential. Title 13, § 353, Code of Alabama 1940 (Recomp 1958).

6. 354 F.Supp. 1284–85.

7. In its opinion the district court stated:

> Defendant stated that the primary reason he adopted the rule requiring his consent prior to such lawsuits being filed by his court personnel was that he had been personally working with a group of people—particularly the Montgomery Kiwanis Club, the Junior League of Montgomery, a Jewish Ladies Group, and the Montgomery Area United Appeal—in an effort to raise money to build, equip and operate a home in Montgomery for neglected black children and that he felt that the filing of such a suit would probably interfere with such a program. The Kiwanis Club had tentatively approved $30,000.00, conditioned on United Appeal's furnishing operating funds for the home. Thetford explained that one defendant in the 1972 suit, Brantwood Nursing Home, is an all-white children's home in Montgomery dependent upon the United Appeal and other private funds for support; that the United Appeal has a policy of not duplicating efforts by supporting two institutions providing the same service; and that should the 1972 suit be successful in integrating Brantwood, United Appeal's policy would forbid their furnishing operating funds for another home for the care of neglected black children in addition to Brantwood and would, therefore, defeat the planned home for black children. Without contradiction, the project has been suspended pending Abbott's suit.
>
> 354 F.Supp. at 1284–85.

bott indicated that he had little faith in the judge and did not consider him effective. He felt that the 1972 suit was a better method of achieving improvements. He did not consider it necessary to discuss the lawsuit with the judge or to inform him of his intention to file the suit.[8]

From my point of view every judge who is actively engaged in the discharge of court functions knows the importance of a cooperative and confidential relationship with staff members. The absence of either cooperation or confidentiality is disruptive and inevitably impairs the operation of any court. Indeed, judges of this court are fully aware of the necessity of such cooperation and confidentiality with secretaries, law clerks, the circuit court executive, personnel in the clerk's office, and those serving in the staff attorney's office.

It is not enough to say that there are many unpleasant conditions in modern society, some of which are obviously revolting to all judges and other court personnel. The welfare of dependent and neglected children is important but it is only one of the ills of modern American society. There are problems of discrimination in employment, discrimination in the selection of juries, discrimination against the aged, unfair treatment of the poor, pollution of the environment, and a myriad of other problems. But the function of courts and personnel who work closely with judges is not to engage actively in litigation; their function is to achieve effectively the objects and purposes for which the court was created. It is quite likely that the family court of Montgomery County, Alabama, like this court and many others, has enough responsibilities in the discharge of duties regularly assigned, to tax the talents and fully absorb all of the energies of judge and court personnel alike.

There is no evidence that Mr. Abbott had any relationship with or obligation to the children he represented. The record clearly supports the finding that two of the minor plaintiffs were unknown to Mr. Abbott; he had never even seen them. They were not wards of the court for which he worked nor is it demonstrated that the court had any known responsibility specifically related to them. The third minor plaintiff was slightly known to Mr. Abbott, but was not a ward of Judge Thetford's court. He was a ward of a similar court in Jefferson County, Alabama. Moreover, there is nothing in the record to indicate that no one else was available to act as next friend of the plaintiffs.[9]

8. *Id.*

9. The district court found:

> Plaintiff argues with commendable zeal, that the rights of black minors to have their civil rights vindicated and the right of Plaintiff to bring a suit to vindicate such rights outweigh any "state interest" allegedly involved. While the civil rights of all are of grave importance to this Court, no clear legitimate reason appears why the minors would have been deprived of their rights had the suit been brought by some person other than a chief probation officer of a court needing the good will of the defendants. The suit is financed by the ACLU, whose members presumably are available for nominal as well as financial support. The files and records of this Court are regularly interspersed with suits brought by members of civil rights organizations, and the organizations, as well as their members, have courageously allowed their names to be used in such litigation. The only substantial evidence offered by Plaintiff as to scarcity of persons to act as next friend for the minors was that Plaintiff went to Attorney Mandel, presumably with expectations of suing as next friend for the then delinquent minor Player, and that he agreed to act as next friend for Coefield and Scott when Father James declined to act. Suffice it to say, there was no evidence of any substantial attempt to find any next friend, other than Plaintiff Abbott, for the minors, and both Abbott's evidence and brief of the Plaintiff admit existence of a living father of one minor and a grandmother of another. This evidence is relevant to show that the interest to be weighed against state interest in this case is the right of Abbott to file a suit for others, not the rights of the minors to have their rights vindicated. There was no substantial proof that the minors would have lost their rights had someone other than Abbott served as their next friend.
>
> 354 F.Supp. at 1287–88.

With the foregoing factual background and the facts found by the district court, *Abbott v. Thetford, supra*, we come to a consideration of the applicable law. First, the majority opinion is diametrically opposed to the decision of this court in *Smith v. United States*, 502 F.2d 512 (5th Cir. 1974). In *Smith* we recognized the importance of a profound national commitment to the concept that debate and the expression of opinions on public issues should be "uninhibited, robust, and wide open" and that such activity may well include vehement, caustic and unpleasant attacks upon government and public officials. In considering First Amendment rights the court is always required to look at the *place, time, and circumstances involved* in striking the necessary delicate balance between the interests of the government and the constitutional rights of the individual. A controversy that arises on the hustings at a political rally, during a debate in a classroom, on a public street or in a public park may be vastly different from those which arise in another context.

In *Smith* a clinical psychologist employed at a Veterans Administration hospital that provided therapeutic treatment for patients in need of emotional rehabilitation, insisted upon his First Amendment right to wear a "peace pin" on the lapel of his coat. To him the pin was "symbolic speech." The psychologist, like Mr. Abbott here, did not claim a lack of understanding of hospital policy nor a denial of due process. Rather, he claimed the right to wear his pin notwithstanding the opinion of his superiors that it was improper to do so in the hospital ward. *Smith* fully recognized that public employment should not be conditioned upon the denial of constitutional rights and relied on *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460, 1473 (1958); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952). In considering the delicate balance between the right of government to regulate the activities of its employees that directly interfere with the proper performance of their duties, and the employees' right of free speech, we analyzed the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811, 817 (1968) and our decision in *Hobbs v. Thompson*, 448 F.2d 456, 470 (5th Cir. 1971). The principles set forth in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), and *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) were applied. We clearly recognized that in order to justify the slightest interference with First Amendment rights there must be a showing that the exercise of such rights "materially and substantially" interfered with the duties required to be performed by an employee. As an example we cited *Goldwasser v. Brown*, 135

U.S.App.D.C. 222, 417 F.2d 1169 (1969), wherein a civilian language instructor at Lackland Air Force Base was dismissed because of certain statements concerning the Vietnam war and anti-Semitism made by him to a class of foreign military officers. There the Court held that Goldwasser's First Amendment right to free speech was not violated by the limited restriction requiring him to keep his opinions to himself in the context of his "highly specialized teaching assignment." 417 F.2d 1169, 1177.

In *Pickering v. Board of Education, supra*, the Supreme Court emphasized the "time, place and circumstances" concept when dealing with the First Amendment rights of employees. We quote:

> The statements are in no way directed towards any person with whom Appellant *would normally be in contact in the course of his daily work* as a teacher. Thus no question of maintaining either *discipline by immediate superiors or harmony among coworkers* is presented here. Appellant's employment relationships with the Board and, to somewhat lesser extent, with the superintendent *are not the kind of close working relationships* for which it can persuasively be claimed that *personal loyalty and confidence* are necessary to their proper functioning. (emphasis added)

391 U.S. at 569–70, 88 S.Ct. at 1735, 20 L.Ed.2d 818. To the same effect is this court's decision in *Pred v. Board of Public Instruction*, 415 F.2d 851, 858–59 (5th Cir. 1969).

The majority relies heavily on *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 335, 9 L.Ed.2d 405, 416 (1963). That reliance is misplaced. The relationship between the NAACP and the people it serves is in no way comparable to the relationship between a court and its chief probation officer. The primary issue was one of standing and the right of the NAACP to render legal assistance to certain persons and to engage in litigation on their behalf. In my view the district court properly applied the balance of interest test. *See Battle v. Mulholland*, 439 F.2d 321, 324 (5th Cir. 1971). The majority opinion did not properly apply that test, if it applied it at all.

Moreover, the opinion is both internally inconsistent and ambiguous; it is unclear whether the holding is premised upon a finding of facial overbreadth or unconstitutional application. The opinion states:

> During oral argument before this Court there was a great deal of preoccupation with facial overbreadth of the order as opposed to unconstitutionality as applied. On this record we feel no need to enter into this fine distinction.

Despite this disclaimer, the majority not only concludes that "the order was unconstitutional as applied," but also enters into an elusive and finespun distinction between the subjective and objective standards involved in Judge Thetford's action, thus embarking upon that very analysis of facial overbreadth that it purported to eschew. The court concedes that "Judge Thetford would not be required to have delayed discharging Abbott until disruption to the Juvenile Court's operations actually occurred." Nevertheless, it concludes that he had not "shown sufficient facts upon which he could have reasonably forecast disruption", and that his action was based merely upon "subjective apprehensions of disturbance to the Juvenile Court." This conclusion of subjectivity is simply not supported by the evidence. The majority itself admits that "the 1972 lawsuit was filed against the *chief resources* of the Juvenile Court"; that the policies of the agencies involved were "of *significant operational consequence* as Judge Thetford performs his important duties"; and that "the reinstatement might revive old antagonisms." (emphasis added) These factors clearly provide an adequate objective foundation for Judge Thetford's conclusion that disruption was likely.

It is impossible to support the conclusion that Judge Thetford's directive about the filing of lawsuits is not related to the court's policies or is not an administrative ruling. In my view it is both a statement of policy and an administrative ruling.

The rationale of the majority is vague, indefinite, uncertain and ambiguous. It totally overlooks the fundamental requirement of cooperation and confidence between a judge and his chief probation officer in the discharge of vital responsibilities affecting the lives and welfare of dependent and neglected children. Not only was Mr. Abbott's conduct a violation of the principle of cooperative responsibility, trust and confidence, it constituted insubordination and a total disregard for the welfare of Judge Thetford's court. *See Beilan v. Board of Pub. Ed.*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958); *Nelson v. Los Angeles County*, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971); *NLRB v. R. C. Can Company*, 340 F.2d 433 (5th Cir. 1965); *NLRB v. Soft Water Laundry, Inc.*, 346 F.2d 930 (5th Cir. 1965).

If this court had correctly decided the issues presented, there would be no necessity of considering the troublesome Eleventh Amendment issue involved in reinstatement and back pay. As a matter of fact the opinion only mentions the problem; it makes no effort to solve it.

Finally, if this court is to extend the reach of federal power as evidenced by the majority opinion, it would be well advised to avoid decisions that invade the chambers of a state court judge, strike down his administrative rulings and require the court over which he presides to continue the employment of a willfully disobedient employee. This is especially true in the case of an employee whose primary duty is to cooperate with the judge, preserve the confidential and harmonious relationship between the judge and other staff members, and use his energy and talents in the discharge of the serious duties imposed by law upon the court. The personal desires, ambitions or motives of Mr. Abbott must not dominate or interfere with the functions of the court or impair the relationship between the judge and staff members. It is evident that Judge Thetford's court, regardless of who may serve as presiding judge, must continue to deal with sad and tragic problems involving the lives and welfare of dependent and neglected children. That court must have the services of a chief probation officer who is fully cooperative and who will follow the judge's reasonable administrative directives, and whose service and activity will preserve confidence in the court. The judgment of the district court should be *affirmed*.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Feb. 20 1973]

C.D. (DENNY) ABBOTT,)
)
Plaintiff,)
)
vs.) CIVIL ACTION NO. 3847-N
)
WILLIAM F. THETFORD,)
Etc.,)
)
Defendant.)

OPINION

This cause is a proceeding by Plaintiff Abbott, Chief Probation Officer of the Circuit Court, Domestic Relations Division of Montgomery County, Alabama, against Defendant Thetford, Judge of that Court, for the allegedly wrongful discharge of Plaintiff by the Defendant for violation by Plaintiff of a departmental order issued by the Defendant to Plaintiff and other employees of that Court. The Judge ordered that his staff not bring suits with possible exceptions. Plaintiff brought suit as next friend for certain minors.

This Court has jurisdiction because of the allegations of violations of 42 U.S.C. 1983 and the due process clause of the Fourteenth Amendment. The Court in Harrington v. Taft, 339 F.Supp. 670, 672, in reference to a similar case, stated the following:

> "The jurisdiction of this court to sit in a § 1983 action is established by 28 U.S.C. § 1343.
>
> "Section 1983 invests the federal courts with the power to enforce

the provisions of the Fourteenth Amendment of the Constitution of the United States against 'those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.' Monroe v. Pape, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). In the instant case, the plaintiff charges that the manner in which he was deprived of continued employment with the Cranston Police Department constituted a violation of the Fourteenth Amendment, specifically the clause which provides that no State shall 'deprive any person of life, liberty, or property without due process of law. And it is well settled that municipal ordinances and the actions in office of municipal officials constitute state action and are within the prohibition of the Fourteenth Amendment. Yick Wo v. Hopkins, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Lovell v. Griffin, 1938, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949.' McCoy v. Providence Journal Co. (1st Cir. 1951), 190 F.2d 760, 764 cert.den. 342 U.S. 894, 72 S.Ct. 200, 96 L.Ed. 669 (1951). Claims of denial of procedural due process arising out of dismissal from public employment are routinely accepted by federal courts as being within the contemplation of

§ 1983. See Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970)(DROWN I).

"[2] There is no doubt that plaintiff has an interest in being rehired sufficient to prevent the City of Cranston from discharging him for constitutionally impermissible reasons. Slochower v. Board of Higher Education of New York City, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. den. 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967); Albaum v. Carey, 283 F. Supp. 3 (E.D.N.Y. 1968)."

Plaintiff insists upon the invalidity of the order and the impropriety of his discharge - both as to cause and procedure. He admits the wilful violation of the order but says the order that he not bring suit infringed his alleged right to freedom of speech and right of redress of grievances protected by the First Amendment and "chilled" the rights of the minors for whom he brought the suit to equal protection protected by the Fourteenth Amendment. Plaintiff further says the discharge deprived him of property without due process of law. He alleges that he felt a moral obligation to do what was necessary to provide better facilities for such minors.

The Defendant Judge insists upon the propriety of both the order and the discharge, basing his position on the fact that he was

also seeking facilities for the care of neglected black children through amicable means; that Defendant directed that no such suit be filed because Defendant had reason to believe that Plaintiff was considering a suit which would probably defeat Defendant's efforts to obtain such facilities; and that such suit was a wilful violation of his order and would tend to interfere with the effectiveness of his Court unless the Judge disassociated himself from the issues of the suit by discharging Plaintiff. The state law, Act 2280 of the 1971 Legislature, State of Alabama, provides for consideration by a county personnel board of the propriety of departmental orders such as that in question (Subsections 2c, 11) and of the propriety of the discharge of such personnel (Subsections 9, 10). The Plaintiff failed to avail himself of this administrative remedy. He claims that the remedy would have been unfair as the Defendant was, as a matter of law, one of the three Circuit Court Judges who jointly appointed one of the three personnel board members.

Evidence tends to show, and this Court finds, that both parties were seeking to obtain better facilities for care of neglected black children. There is no question in this case of the desirability of protection of needy children of all races nor is there any question of their constitutional right to equal protection in the use of public facilities.

FINDINGS OF FACT

Defendant Thetford is and was at all pertinent times Judge of the Circuit Court of

Montgomery County handling all domestic relations and juvenile court problems and the supervisory officer of approximately 40 county employees, including Plaintiff Abbott who, until his discharge on November 17, 1972, served as Chief Probation Officer of the juvenile jurisdiction of that Court.

In 1969, Plaintiff, as Chief Probation Officer and as next friend of minors, had filed a suit (designated as the 1969 suit) against certain state officials, without the consent of Judge Thetford and without having given prior notice to Judge Thetford either of his intention to file the suit or of the specific facts complained of. That suit sought to correct the unsatisfactory commitment facilities for delinquent and neglected children in Montgomery County and to correct certain mistreatment of minor inmates at the Mt. Meigs Industrial School, a state institution for incarceration and treatment of juvenile delinquents. During the pendency of that 1969 suit, the Plaintiff, after having made one or more news releases about the suit and after having been directed by the Judge to give no more news releases, was suspended for 15 days for having given a news release in violation of the Judge's order. After a conference between Plaintiff and Defendant, the suspension was lifted after ten days. That suit and the surrounding circumstances are relevant only to the parties' knowledge and state of mind in the fall of 1972.

Judge Thetford, upon being informed in October, 1972, that Chief Probation Officer Abbott was spending considerable time in the office of a lawyer known to be interested in civil rights matters and suspecting that he

proposed to file another lawsuit, called together three persons, Miss Goodwin, Mr. Franklin and Mr. Abbott, as department heads of court personnel, and issued an order directing that no suit, with possibly some exceptions, be filed by court personnel. While recollections are in conflict as to the conditions of the prohibition, some of the witnesses testified that the prohibition involved only suits which might involve the operation of the Circuit Court and excepted those suits wherein the Judge's previous knowledge and consent was secured. This Court finds that all concerned understood that the type suit intended to be prohibited was any suit that the Judge felt would affect the operation of the Court. Obviously, all parties understood that the purpose thereof was to provide that the Judge have an opportunity to decide the propriety of his assigned personnel's filing suits which the Judge thought might affect the effectiveness of his Court.

Within approximately one month after said order, Mr. Abbott wilfully and knowingly violated the Judge's order by filing the 1972 suit against the Alabama Department of Pensions and Securities and six allegedly private children's homes in Alabama - all of which are facilities of the Thetford Court in the sense that that Court must coordinate regularly with the Department and the Court has an opportunity to place neglected children in its custody with such homes at the homes' discretion.

Several witnesses, both black and white, stated that effectiveness of the Court with the defendant children's homes had not diminished since the suit. The effect of the suit, however,

must be considered in light of the fact that Abbott was immediately discharged upon his filing the suit.

At least one of the managers of one of the defendant homes has informed Judge Thetford that his home is supported largely by white donees and that the attempt to judicially integrate the home will seriously curtail donations. Judge Thetford testified that, to his best knowledge, the suit by his Chief Probation Officer would probably adversely affect the relationship of his Court with the several defendant children's homes which have absolute authority to decline for placement at such home any child referred thereto by his Court. He further testified without contradiction that his Court must work closely with the Department of Pensions and Securities. It is argued that someone had to decide whether the Court's function would be better served by working with the predominantly white institutions and trying amicably to get other facilities for blacks or by filing this suit. Abbott is the alter ego of the Judge. Abbott's disapproval of a correctional or custodial institution is often considered to be the Judge's. The Judge's function involves the Judge's support, insofar as his public image is concerned, of public or semi-public correctional and child care institutions. His duties involve sentencing persons to or placing persons in said facilities and an implication follows that these institutions are judicially approved for their purpose. He must work with the authorities in these institutions. The necessity that he work with these authorities is inconsistent with his court's personnel's being involved in litigation adverse to these institutions.

Defendant stated that the primary reason he adopted the rule requiring his consent prior to such lawsuits being filed by his court personnel was that he had been personally working with a group of people - particularly the Montgomery Kiwanis Club, the Junior League of Montgomery, a Jewish Ladies Group, and the Montgomery Area United Appeal - in an effort to raise money to build, equip and operate a home in Montgomery for neglected black children and that he felt that the filing of such a suit would probably interfere with such a program. The Kiwanis Club had tentatively approved $30,000.00, conditioned on United Appeal's furnishing operating funds for the home. Thetford explained that one defendant in the 1972 suit, Brantwood Nursing Home, is an all-white children's home in Montgomery dependent upon the United Appeal and other private funds for support; that the United Appeal has a policy of not duplicating efforts by supporting two institutions providing the same service; and that should the 1972 suit be successful in integrating Brantwood, United Appeal's policy would forbid their furnishing operating funds for another home for the care of neglected black children in addition to Brantwood and would, therefore, defeat the planned home for black children. Without contradiction, the project has been suspended pending Abbott's suit.

Further reasons for the discharge were as follows:

1. The defendants in the 1972 suit were the Alabama Department of Pensions and Securities and several privately financed child care institutions with which the Montgomery County

Family Court might place neglected children. These are agencies not required to accept children from any court, so harmony and good will of the officials thereof is in the best interest of the Thetford Court. Lawsuits usually tend to discourage harmony and good will between the parties.

2. Judge Strickland, an experienced family judge, testified that, in determining policy matters relating to a responsibility to all children, there must be an intra-agency chain of command with final responsibility resting on the person most responsible to the people - that is the judge. Otherwise, employees of the agency may seek the same end by conflicting and mutually detrimental means, thereby defeating a desirable end. Without this authority, employees may indulge in counteracting efforts, disorganization or even chaos may result and the Court may lose its responsiveness to, and relationship with, the community. Judge Strickland stated that a suit by a family court official against the agencies involved here is disruptive to Court effectiveness and that common sense and responsibility, independent of any rule, should have prohibited such a suit as that filed by Abbott. He and others stated that both the rule against suits and the discharge of Abbott under the circumstances testified to were reasonable.

3. The chief probation officer is the right arm of the Court in which the judge must have great trust. The first action of Abbott in filing suit as Chief Probation Office to improve Montgomery County Juvenile facilities, when Abbott knew that excellent juvenile

facilities were actually being constructed, suggested that Abbott had included that cause for publicity purposes only and caused the Judge to lose faith in Abbott, even though there was merit to the other aspect of the case. The Judge felt that he should, therefore, consider all aspects of any suit Abbott might file which might affect the Court. Judge Thetford testified that, if he saw the need to correct another agency in the interest of minors under Court custody, he tried to do so in private conference with officials thereof and that a lawsuit should be the last resort.

Mr. Abbott implied that he had little faith in his Judge. He said that on other occasions, when he had reported wrongs to the Judge, the Judge was satisfied to report these matters or have Abbott report them to state officials who did nothing about them. He stated that he did not tell Judge Thetford all about the wrongs against the minor plaintiffs in the 1972 suit because he thought the Judge would do no more than quietly encourage the state officials to do better.

In short, the Judge's personality is such that he seeks to right those wrongs brought to his attention by quietly encouraging those responsible to do better and, as he says, by filing a lawsuit "as a last resort". On the other hand, the Probation Officer, having once determined the proper end, proceeds with all available dispatch. The two simply do not agree on means to accomplish an end, and they no longer trust each other. Without trust in such positions, arguably the Court's efficiency will suffer.

MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

The Defendant moved to dismiss and for summary judgment and insisted on the grounds of comity and lack of exhaustion primarily concerned with the contention that provisions of State Act 2280 of the 1971 Legislature of the State of Alabama provided for consideration of personnel problems of certain classified personnel, including Mr. Abbott, to be determined on the administrative level by a personnel board. Mr. Abbott elected to disregard his right provided by § 2(c) and § 11 of said Act for appeal of the order of Judge Thetford that no employee of the Court should file suit. Mr. Abbott elected also not to proceed under §§ 9 and 10 thereof for review of his discharge by the personnel board. Disregarding his statutory state remedies, he immediately filed his suit in federal court for wrongful discharge.[1]

In a sense, it may be argued that, since Mr. Abbott was not actually Judge Thetford's

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1/ To support his motions, Defendant cites the rule set out in Dorsey v. NAACP, 408 F.2d 1022 and Charters v. Shaffer, 181 F.2d 764, 765, that the right of a police officer to be reinstated derives solely from the law of the state, where a state statute provides for reinstatement for wrongful discharge. The wealth of authority, including Snowden v. Hughes, 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397, may well have justified an initial dismissal of this cause on motion. Minor distinctions in the facts of this case justify a hearing, in this Court's opinion.

employee but was an employee of the County, and since all Judge Thetford did was to start the wheels in motion for Mr. Abbott's discharge, Abbott's discharge took place because of his refusal to process an administrative appeal to the personnel board as provided by the state law. Defendant's attorneys argue that the Plaintiff, having voluntarily abandoned his state remedies for reinstatement, has no standing to proceed herein. The Defendant asks how one refusing to present his side of a case can complain of a failure of a hearing thereof. While this argument has obvious merit and would logically justify an exception to the general rule[2], this Court feels bound by prior decisions, under the principle of stare decisis, to the holding that exhaustion of state remedy is not a prerequisite to a proceeding pursuant to 42 U.S.C. § 1983. Mitchum v. Foster, 407 U.S. 225.

The Defendant further says that there have been a number of case exceptions made to the rule that exhaustion is not required in § 1983 actions and that such cases justify

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2/ The suggested exception is that, where the right allegedly invaded involves a hearing provided for by a statutory state procedural hearing conforming to due process and this hearing is not sought by the plaintiff, the plaintiff is in no position to prove that the defendant violated his right since an element thereof was a hearing by another which the plaintiff lost by reason of his own inaction.

recognition of the following exceptions:

> 1. If a three-judge court is required, ordinarily no exhaustion is required, whereas if one judge may determine the issues in the federal court, then exhaustion should be required;
>
> 2. That the courts favor a requirement of exhaustion of state remedies where a set administrative remedy is available to the plaintiff in the state procedure rather than a judicial remedy; and
>
> 3. That the desirability of requiring exhaustion is increased where the plaintiff knowingly and voluntarily abandons his state remedies in order to shop for a federal court which he thinks is more in sympathy with his side of the case.

While some courts have made exceptions to the rule, the Fifth Circuit has not clearly recognized any such exception insofar as this Court can ascertain.

The Defendant also contends that this Court should decline to take jurisdiction of this case on the grounds that a substantial and adequate state remedy is available. In this Court's opinion a substantial and adequate state remedy is provided by said statute.

This Court denied Defendant's motion to dismiss and his motion for summary judgment upon the theory that 42 U.S.C. 1983 is an additional remedy to other remedies available

to Plaintiff and that he, therefore, was not required to pursue the State statutory appeal before filing this § 1983 action.

CONCLUSIONS OF LAW

The Plaintiff alleges infringement of his right to free speech, access to the courts and due process of law guaranteed by the First, Fifth and Fourteenth Amendments. These rights must be considered in the light of their relationship to necessary state functions reserved to the states by the Tenth Amendment.

The Supreme Court has articulated the right to continued employment that:

> "*** (C)onstitutional protection does not extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216.

The due process clauses of the Fifth and Fourteenth Amendments protect a public employee against impermissible grounds of discharge and improper manner of discharge from public employment, but he must comply with lawful and reasonable terms laid down by proper authorities. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692. In Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, petitioner was reinstated to his public job as due process protected him from removal pursuant to a patently arbitrary statute. See

also, Schware v. Board of Bar Examiners, 353 U.S. 232, 238-9. The due process clause of the Fourteenth Amendment also guarantees access to the courts. Gittlemocker v. Prasse, 428 F.2d 1, 7; Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718. However, there may be a question whether it guarantees such access for the purpose of righting wrongs for persons other than the person seeking to assert the right.

Numerous cases emphasize that, in cases testing the propriety of discharge from public employment because of the exercise of a constitutional right, the importance of that right must be weighed against the right of a government to regulate the individual where a compelling government interest is shown to outweigh the individual interest. United States v. Pipefitters Union, (C.A. Mo. 1970) 434 F.2d 1116, adhered to 434 F.2d 1127, cert. granted 91 S.Ct. 2168, 402 U.S. 994, 29 L.Ed. 2d 160, reversed on other grounds 33 L.Ed.2d 11, 92 S.Ct. 2247 (1972); American Fed. of Teachers v. School District, (D.C. Colo. 1970) 314 F.Supp. 1069; Morales v. Turman, (D.C. Tex.) 326 F.Supp. 677; Wallace v. Brewer, (D.C. Ala.) 315 F.Supp. 431. Defendant insists that he has shown compelling government interests in the necessity for trust between a judge and his probation officer, and in the need for interagency cooperation between the Department of Pensions and Securities, the Thetford Court of which Abbott was the "right arm", and the private homes for neglected children. These compelling government interests may outweigh the interest of Abbott in appearing as next friend for minors in a suit wherein any other adult could have appeared as such next friend.

Plaintiff argues, with commendable zeal, that the rights of black minors to have their civil rights vindicated and the right of Plaintiff to bring a suit to vindicate such rights outweigh any "state interest" allegedly involved.[3] While the civil rights of all are of grave importance to this Court, no clear legitimate reason appears why the minors would have been deprived of their rights had the suit been brought by some person other than a chief probation officer of a court needing the good will of the defendants. The suit is financed by the ACLU, whose members presumably are available for nominal as well as financial support. The files and records of this Court are regularly interspersed with suits brought by members of civil rights organizations, and the organizations, as well as their members, have courageously allowed their names to be used in such litigation. The only substantial evidence offered by Plaintiff as to scarcity of persons to act as next friend for the minors was that Plaintiff went to Attorney Mandel, presumably with expectations of suing as next friend for the then delinquent minor Player, and that he agreed to act as next friend for Coefield and

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3/ Questions to be raised in that suit, for instance, the question of whether the children homes are private in the sense that they are not subject to federal integration requirements, need not be decided in this case.

Scott when Father James declined to act.[4/] Suffice it to say, there was no evidence of any substantial attempt to find any next friend, other than Plaintiff Abbott, for the minors, and both Abbott's evidence and brief of the Plaintiff admit existence of a living father of one minor and a grandmother of another.

4/ There was some evidence to support the comment in Defendant's brief comparing Father James' reluctance to serve as next friend with Abbott's availability as follows: "*** Father James decided not to bring suit because he was a Catholic priest, and he felt it would be improper for him to file suit against homes operated by other religions. *** Comparing Father James position to that of the Plaintiff we have on the one hand a priest under no orders not to file lawsuits; who is intimately involved with the plight of the minors involved, but who realizes that the filing of such a suit as filed by Mr. Abbott might reasonably have an adverse effect upon his church by harming its relationships with other denominations. On the other hand, we have the Plaintiff, a Chief Probation Officer, under a direct order by his superior not to file suits affecting the operations of the Juvenile Court, who has never known nor even seen two of the three minors involved, and whose employer must depend upon the voluntary aid of the organizations sued to effectively operate. Considering the evidence in this case, only one conclusion can be drawn concerning the Plaintiff's being in a 'better

This evidence is relevant to show that the interest to be weighed against state interest in this case is the right of Abbott to file a suit for others, not the rights of the minors to have their rights vindicated. There was no substantial proof that the minors would have lost their rights had someone other than Abbott served as their next friend.

Various courts have applied various tests in determining the propriety of discharge of public employees. Some courts seem to rely on what is referred to as the "arbitrary grounds for discharge" test and others apply the "compelling state interest" test. This Court is of the opinion that the facts of this case justify consideration of the "arbitrary grounds" test in weighing the "compelling state interest" involved.

In Birnbaum v. Trussell, (2 CCA 1966), 371 F.2d 672, 678; Newcomer v. Coleman, 323 F.Supp. 1363; and Hunter v. City of Ann Arbor, 325 F.Supp. 847, 854, the rule is expounded that, in removal-from-public-employment cases,

> "*** whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be

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position' to vindicate rights of Player, Coefield and Scott; that his position as Chief Probation Officer would lend more publicity value to the case; that it would paint the suit with internal factionalization and dispute and provoke controversy within controversy. These were precisely the actions sought to be controlled by the Defendant's directive."

> removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." (Emphasis added)

In Hunter, there were two substantial interests involved other than employment - reputation and the ability to pursue a profession effectively. This Court finds that Abbott's interests involve his desire to obtain adequate facilities for the care of neglected black juveniles, the desire for continued employment by the State, and his reputation. Abbott, therefore, meets the "substantial interest" test of Birnbaum and Hunter.

We turn then to the question of whether Abbott was discharged on arbitrary grounds. The Court in Hunter v. City of Ann Arbor, supra, quoting Roth v. Board of Regents, 310 F.Supp. 972, 979, in seeking to determine what are not "arbitrary grounds" for discharge of public employees, stated that:

> "*** in applying the constitutional doctrine, the court will be bound to respect bases for nonretention enjoying minimal factual support and bases for nonretention supported by subtle reasons."

One of Judge Thetford's reasons for the rule was that he felt that the filing of the suit by his court personnel would probably interfere with both his relationship with groups his Court must work with and his program of working for facilities, hopefully to be provided by the Kiwanis Club and the United Appeal,

which would supplement private facilities for the care of neglected black youths. Evidence shows the Kiwanis program is mired down by the Abbott suit. Judge Strickland, a defense expert witness, phrased the problem by stating that a Chief Probation Officer is the "right arm" of the Court and that his hostile act toward persons upon whom the Court must depend to effect its ends, may be considered as the hostile act of the Court, and necessarily discourages desirable cooperation. This Court is of the opinion that the bases stated by Judge Thetford for nonretention of Mr. Abbott are more than "minimal" and are supported by more than "subtle reasons," other than constitutionally inappropriate factors such as race or suppression of freedom of speech or right to redress of grievances. While racial matters are involved in this case, both Plaintiff and Defendant are of the same race and both were attempting to solve the same problem of shortage of institutional care for neglected black children. Only their methods were in conflict, so it cannot be strongly urged that the discharge was racially inspired.

The Birnbaum tests of "substantial interest" and of "non-arbitrary grounds" having been met, we turn to the question of whether the procedure relating to Abbott's discharge was "calculated to determine whether legitimate grounds do exist" for the discharge. It is axiomatic that no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him and be allowed to meet it on the law and facts and show, if he can, that it is unfounded.

Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841; Irons Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 49 L.Ed. 836, 25 S.Ct. 474; Ray v. Norseworthy, 23 Wall 128, 23 L.Ed. 116. If reasonable opportunity for hearing is afforded a person affected by a proceeding, then he has had due process. Lynde v. Lynde, 181 U.S. 183, 45 L.Ed. 810, 21 S.Ct. 555. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law, of the step asked to be taken. 16 Am.Jur.2d 977, Constitutional Law, § 572, citing (New England Div. case) Akron, C.Y.R. Co. v. United States, 261 U.S. 184, 67 L.Ed. 605, 43 S.Ct. 270; Smith v. McCann, 24 How. 398, 16 L.Ed. 714; Wilkey v. State, 238 Ala. 595, 192 So. 588, 129 A.L.R. 549.

This proceeding closely parallels that in Jaeger v. Freeman, (5 CA, 1969) 410 F.2d 528, 531, wherein the Court stated the following:

> "We start with the proposition that due process does not in every instance require the Government to afford a trial-type hearing to an employee before discharging him. Cafeteria & Restaurant Workers Union Local 473, A.F.L.-C.I.O. v. McElroy, 1961, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d, 1230. See also Chafin v. Pratt, 5 Cir., 1966, 358 F.2d 349, 356-357, cert. denied, 1966, 385 U.S. 878, 87 S.Ct. 159, 17 L.Ed.2d 105."

The Court system itself will be weakened if a judge, in situations where court efficiency may otherwise suffer, cannot discharge the employees of his court who wilfully disobey rules laid down by the judge and interfere with the effectiveness of the court. While some courts have stated that an opportunity for a hearing must be provided before deprivation of a person's property or liberty, the Supreme Court has stated that due process contemplates that

> "*** (A)n individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. 371, 378-379, 28 L.Ed.2d 113, 119, 91 S.Ct. 780; Fuentes v. Shevin, 32 L.Ed.2d 556, 571.

Other occasions have been recognized where the hearing need not precede the action, it being sufficient if a review is available. George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 77 L.Ed. 1265, 53 S.Ct. 620; American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98, 86 A.L.R. 298; Granader v. Public Bank, 281 F.Supp. 120, affm'd. (CA 6) 417 F.2d 75, cert.den. 397 U.S. 1065, 25 L.Ed.2d 686, 90 S.Ct. 1503. The State Act 2280 made such a hearing available to Mr. Abbott.

The principles in Jaeger v. Freeman, supra, are arguably authority for a judgment for the Defendant Thetford on the merits as well as the procedure. But, because of what appears to be some possibly distinguishable

aspects, this Court will consider the causes of Abbott's dismissal in the light of other cases.

It is not here suggested by the Plaintiff that the Alabama statute, under which he was afforded the right to hearing, did not provide him an ample apportunity "to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken." He does offer as his reason for not seeking the state remedy that no fair hearing could have been given him since one member of the County Personnel Board was selected by three state circuit judges including the Defendant. In this Court's opinion, that fact does not destroy the adequacy of that remedy though it might have been a consideration in determining whether that particular member should have participated if Plaintiff had sought such a hearing. Absent some showing that the supposedly tainted member would not have recused himself (even assuming his disqualification), this Court will indulge no presumption adverse to the integrity of that Board. This Court is, therefore, of the opinion that the procedure relating to Abbott's discharge was "calculated to determine whether legitimate grounds" did exist for his discharge and that the available hearing was constitutionally sufficient. See 16 Am.Jur.2d Constitutional Law, § 576 at 981. Under the test of the Birnbaum, the discharge of Abbott would have been justifiable.

While it may be difficult in some jurisdictions to determine whether to adopt the "reasonable relationship" test or the "controlling

public interest" test, the Fifth Circuit Court of Appeals has adopted a procedure in wrongful-denial-of-employment cases which seems to this Court to be reasonable and practical, and it must be considered as binding in this jurisdiction. Ferguson v. Thomas, 430 F.2d 852, 858-859:

> "Federal Court hearings in cases of this type should be limited in the first instance to the question of whether or not federal rights have been violated in the procedures followed by the academic agency in processing the plaintiff's grievance. *** If no federal right has been violated in the procedures followed, then the court should next look to the record as developed before the academic agency to determine whether there was substantial evidence before the agency to support the action taken, with due care taken to judge the constitutionality of the school's action on the basis of the facts that were before the agency, and on the logic applied by it. Johnson v. Branch, supra. If the procedures followed were correct and substantial evidence appears to support the Board's actions, that ordinarily ends the matter.
>
> "If the instructor challenges his termination on grounds that his constitutional rights have been infringed, a decision of that claim may and should be avoided, if valid non-discriminatory grounds are shown to have been the basis of the institution's actions. In

closer cases where it is unclear whether a valid basis did exist for the school's action and where the professor's exercise of constitutional rights played an intimate role in the termination decision, the problem should be resolved by striking a balance between the interests on the one hand of the teacher as a citizen in commenting upon matters of public concern and enjoying freedom of association and the interests on the other hand of the state as an employer in promoting the efficiency of the public service it performs through its employees. Pickering v. Bd. of Education, supra; and Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, reh.den. 351 U.S. 944, 76 S.Ct. 843, 100 L.Ed. 1470 (1956). See also Scoville v. Board of Education, 425 F.2d 10 (7th Cir. En Banc, 1970)."

This Court has largely disposed of the question whether "federal rights have been violated in the procedures followed" in discharging Abbott. It has long been recognized that elements of a due process hearing are that the subject be furnished a statement of the charges against him, the names and nature of the testimony of the witnesses to testify against him, and an opportunity to present his defenses after a reasonable time for consideration of the charges and witnesses against him. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5 Cir. 1961); Ferguson v. Thomas, 430 F.2d 852 (5 Cir. 1970). Written charges were furnished Abbott. No witnesses or testimony were furnished, nor were they necessary, when the

charge was publicly admitted by Abbott. A reasonable time for consideration was offered to Abbott.

In the circumstances of Abbott's discharge, there may be other considerations, as suggested in Battle v. Mulholland, (5 CCA) 439 F.2d 321, 324, as follows:

> "It is recognized that the state as an employer has an interest in regulating the conduct of its employees in ways which may be more restrictive than those which can be applied to citizens who are not employees. Pickering v. Board of Education, 1968, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811; Tinker v. Des Moines Ind. Com. School District, 1969, 393 U.S. 503, 506, 507, 89 S.Ct. 733, 21 L.Ed.2d 731. The problem is to balance the rights of the employees as citizens against the interest of the state in promoting efficient public service. Pred v. Board of Public Instruction, (5 Cir. 1969) 415 F.2d 851, 857."

Turning then to a balance of the rights of Plaintiff to file a suit for others not then within his court's jurisdiction and without any proof that others were not available to file such a suit, against the State's interest in providing homes for neglected black minors and efficient court administration, Abbott's rights pale in comparison. Unlike Battle and Tinker, there is more than a mere fear or apprehension of interference with a state

objective; the proposal for a new black children's home before the United Appeal has been suspended until Abbott's suit against Brantwood is decided. Additionally, the necessary trust between Judge and Chief Probation Officer is no more. The Defendant has carried his burden to show within standards applicable to the relationship between judges and their probation officers that Abbott's conduct has materially and substantially impaired his usefulness as a chief probation officer. See the tests indicated by Battle v. Mulholland, supra, 439 F.2d at 325, citing Tinker v. School District, supra, 393 U.S. at 509.

In Ferguson, supra, at page 859, the court made the following observation:

> "Here the proof before the District Court showed that Dr. Ferguson exercised his rights of speech and association to such an extent as to seriously impair, if not to destroy, his effectiveness as an instructor in an organized program of academic tutoring. This was his choice to make. The college had no right to control his speech or to curtail his freedom of association, but they did have a right to terminate his employment as a classroom instructor at the point where the exercise of his constitutional privileges clearly overbalanced his usefulness as an instructor."

This Court finds that Mr. Abbott exercised his rights of free speech, if not his right to

access to the courts, in filing suit on behalf of the said minors. This Court further finds that Mr. Abbott's exercise of this right did seriously impair his effectiveness as a probation officer for the Domestic Relations Court of Montgomery County and that, Abbott having made his choice, the Defendant Judge had a right to terminate his employment at the point where "the exercise of his constitutional privileges clearly over-balance his usefulness as" a probation officer.

It is obvious that Judge Thetford, himself, admired the courageous attempts of Chief Probation Officer Abbott to aid youth. Otherwise, he doubtless would never had relieved his suspension in 1969. However, a public employee in exercising his freedoms must remember his obligations to his employment, and when his exercise of his freedoms substantially interferes with his efficiency as a public officer and with the efficiency of the department employing him, his rights must be weighed against the interest of the state in efficient administration.

Mr. Abbott admits that he never explained the particular needs of any of the minors for whom he filed suit to Judge Thetford. His lack of consideration for his employer and for his job are his undoing. In accordance with the foregoing, his relief must be denied. London v. Florida Department of Health & Rehab. Serv., 313 F.Supp. 591, affm'd. 448 F.2d 655; Blackwell v. Board of Education, (5 C.A. 1966), 363 F.2d 749; Battle v. Mulholland, supra, at 325; Parducci v. Rutland, 316 F.Supp. 352, 355.

O R D E R

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that this case be, and the same is hereby, dismissed, and costs taxed against the Plaintiff Abbott, for the collection of which let execution issue.

DONE this 20th day of February, 1973.

s/ R.E. Varner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1894

[FILED: Aug. 12, 1976]

C.D. (Denny) ABBOTT,

Plaintiff-Appellant,

versus

WILLIAM F. THETFORD, individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama, (JOHN W. DAVIS, III, substituted for William F. Thetford in his official capacity as Judge of the Family Court of Montgomery County, Alabama),

Defendants-Appellees.

- - - - -
Appeal from the United States District Court
for the Middle District of Alabama
- - - - -

ON PETITION FOR REHEARING

(AUGUST 12, 1976)

Before BROWN, Chief Judge, GEWIN, THORNBERRY*, COLEMAN, GOLDBERG, AINSWORTH, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.**

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

*Judge Thornberry did not participate in consideration of the petition for rehearing due to illness.

**Judges Wisdom and Godbold did not participate in this decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

C.D. (DENNY) ABBOTT, Plaintiff,	)	[FILED Dec. 1, 1972]
vs.	)	CIVIL ACTION NO. 3847-N
WILLIAM F. THETFORD, individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama, Defendant.,	)	

O R D E R

The plaintiff, C.D. (Denny) Abbott, seeks to file with this Court a "motion for supplemental relief" in Civil Action NO. 3835-N, Player, et al. v. State of Alabama Department of Pensions and Security, et al.

Civil Action No. 3835-N was filed in this Court on November 17, 1972, by Negro youths through C.D. (Denny) Abbott as next friend. The action is for and on behalf of black children as a class who allege discrimination against the plaintiffs and the members of their class by the State of Alabama acting through the Alabama Department of Pensions and Security in the operation of state-wide child care institutions and certain "semi-private" child care facilities and institutions.

The motion for supplemental relief filed November 30, 1972, is a private action by C.D. (Denny) Abbott against William F. Thetford, individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama. In this case Abbott alleges that he was discharged by the defendant as Chief Probation Officer of the Circuit Court of Montgomery County, Alabama, Domestic Relations Division, for the reason that he filed the action for the plaintiffs in Civil Action No. 3835-N. Abbott contends that his discharge violates both his statutory and constitutional rights.

The motion for supplemental relief is now submitted upon Abbott's motion for a temporary restraining order asking this Court to require the defendant, Thetford, to reinstate him immediately as Chief Probation Officer and restrain the defendant, Thetford, from punishing Abbott for filing Civil Action No. 3835-N.

The matter is also submitted upon Abbott's request to file same in the class action case and, in the alternative, to consolidate his personal case with the class action.

It is obvious that the private action by C.D. (Denny) Abbott against Judge Thetford, styled a motion for supplemental relief, is a separate lawsuit and is not to be filed as a motion in Civil Action No. 3835-N. It is also apparent that the basic thrust of the case by Abbott against Judge Thetford is completely different from that of the Negro plaintiffs against the State of Alabama Department of Pensions and Security, et al. For this reason, it would frustrate both actions to consolidate them.

Furthermore, in this case, as in Williams v. Paul, et al., Civil Action No. 1234-S, Middle District of Alabama, November 30, 1972, plaintiff can be made whole or virtually whole, if he prevails on the merits, by reinstatement and an award of back wages. This Court has consistently followed the policy of not issuing temporary restraining orders in such instances.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That the motion for supplemental relief by C.D. (Denny) Abbott v. William F. Thetford, individually and in his official capacity as Judge of the Family Court of Montgomery County, Alabama, be filed by the Clerk of this Court as a separate civil action upon the payment of the required filing fee.

2. That Abbott's motion to consolidate his case with Civil Action No. 3835-N be and is hereby denied.

3. That the motion by C.D. (Denny) Abbott asking this Court to temporarily enjoin and restrain the defendant, William F. Thetford, be and the same is hereby denied.

Done, this the 1st day of December, 1972.

FRANK M. JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

* * *

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[FILED: Jan 26, 1973]

C.D. (DENNY) ABBOTT,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	CIVIL ACTION
	)	NO. 3847-N
WILLIAM F. THETFORD,	)	
Etc.,	)	
	)	
Defendant.	)	

O R D E R

This cause is submitted on a motion of the Plaintiff, filed January 22, 1973, to supplement the record of the trial of the case terminating on January 16, 1973; a motion of the Defendant, filed January 23, 1973, to strike the January 22, 1973, motion of the Plaintiff; and a motion of the Defendant, filed January 23, 1973, to strike an exhibit attached to Plaintiff's post-trial brief. The motions were considered on hearing wherein all parties were represented by counsel.

It should be noted initially that publications, newspaper articles or magazines offered in evidence to prove the truth of statements therein are hearsay evidence and are inadmissible. Persons v. Summers, 151 So.2d 210, 212 (Ala.); Nashville, Chattanooga, et al Railway Co. v. Yarbrough, 194

Ala. 162, 69 So. 582; Mobile County v. Sands, 127 Ala. 493, 29 So. 26, 27; Poretto v. United States, (5 CCA) 196 F.2d 392; Dallas County v. Commercial Union Assurance Co., (5 CCA) 286 F.2d 388. Plaintiff's attorney does not point out, and this Court has been unable to ascertain, that the publication attached to Plaintiff's brief falls within any recognized exception to the hearsay rule. It would, therefore, appear that the Defendant's motion to strike said exhibit from the Plaintiff's post-trial brief should be granted.

The other two motions refer to the propriety of supplementing the record, after both sides have rested, by adding thereto a statement made by the trial judge informally about a possible issue not raised during the trial of the case. It must be borne in mind that a judge must fairly consider both sides of a case and must do nothing to favor either side. This Court should not - and during the trial would not - have made a suggestion to either side as to how the case should have been tried or as to what the issues should have been. It is the duty of this Court to consider only what was pleaded and proved during the trial and not to consider its own suppositions, beliefs or information - other than those derived from the pleadings and evidence in the case. The parties voluntarily submitted this case on, and are entitled to a fair consideration of, the pleadings and the evidence in the case. This Court erred in suggesting, even in the privacy of chambers and after both sides

rested, an issue not theretofore considered. That error would be compounded into prejudice if the evidence were reopened for consideration of the court-injected issue. The matter, not being a part of the public trial of this case, should not be included in the public record thereof but, for the benefit of any possible review hereof by appellate courts with proper jurisdiction, will be made a part of the sealed record for consideration only upon order of a court of competent jurisdiction. It is, therefore,

ORDERED, ADJUDGED and DECREED as follows:

1. That the motion to supplement the record by the Plaintiff is hereby denied.

2. That the Defendant's motion to strike the evidentiary exhibit attached to Plaintiff's post-trial brief is hereby granted, and the said exhibit is hereby stricken.

3. That the motion to strike the Plaintiff's motion to supplement the record is hereby granted.

4. That the Clerk seal and make a permanent part of the record the Plaintiff's motion of January 22, 1973, and the Defendant's motions of January 23, 1973, all as referred to hereinabove, together with the original publication attached to the Plaintiff's post-trial brief and that said documents be sealed in an envelope marked, "Not to be opened except upon order of court",

and made a permanent part of the record of this proceeding.

DONE this 24th day of January, 1973.

s/ R.L. Varner
UNITED STATES
DISTRICT JUDGE

[S. 1064]

An Act to improve judicial machinery by amending title 28, United States Code, to broaden and clarify the grounds for judicial disqualification.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 455 of title 28, United States Code,[71] is amended to read as follows:

"§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

"(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

"(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

"(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

"(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

"(ii) Is acting as a lawyer in the proceeding;

"(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

"(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

"(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

"(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

"(1) 'proceeding' includes pretrial, trial, appellate review, or other stages of litigation;

"(2) the degree of relationship is calculated according to the civil law system;

"(3) 'fiduciary' includes such relationships as executor, administrator, trustee, and guardian;

"(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

"(i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund;

"(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest' in securities held by the organization;

"(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a 'financial interest' in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

"(iv) Ownership of government securities is a 'financial interest' in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

"(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

Sec. 2. Item 455 in the analysis of chapter 21 of such title 28 is amended to read as follows: "Disqualification of justice, judge, magistrate, or referee in bankruptcy.".

Sec. 3. This Act shall not apply to the trial of any proceeding commenced prior to the date of this Act, nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act.

Approved Dec. 5, 1974.